

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

PC. CIVIL APPEAL NO. 31 OF 2021

(Originated from the judgment of Kigamboni District Court in Matrimonial Appeal No. 7
of 2020)

ZULFA SOLOMON MPULUMA..... APPELLANT

VERSUS

HUSSEIN JUMA KII.....RESPONDENT

JUDGMENT

21/2/2022 & 3/03/2022

N.R. MWASEBA, J.

The marriage between the appellant and the respondent was successfully dissolved at the primary court of Kigamboni. The matrimonial assets were equally divided and the respondent was ordered to pay maintenance for three children at Tshs 300,000/= per month. Aggrieved by the decision the appellant lodged her appeal at the district court of Kigamboni which upheld the maintenance order and set aside the order for equal distribution of matrimonial assets. The appellant was given a house located at Mkuranga

while the respondent was given the house located at Kigamboni. With regard to the vehicle, the appellant and the respondent were to get 40% and 60% of the proceeds respectively. Again, the appellant was not happy with the decision as a result she lodged this second appeal with the following grounds of appeal:

- 1. The magistrate erred both in law and fact on the division of matrimonial assets acquired during the subsistence of the marriage by failure to provide reasons to show how she reached the decision of the matrimonial assets.*
- 2. The magistrate erred both in law and fact by dividing the matrimonial assets without taking into consideration the value and evaluation of the assets acquired during the marriage.*
- 3. The magistrate erred both in law and fact by dividing the matrimonial assets without considering and determining the contribution of each party on acquiring the said properties.*
- 4. The magistrate erred both in Law and fact by a failure to consider and analyse the weight of evidence adduced by the appellant on both submission and rejoinder.*

The facts of the case briefly: The appellant and the respondent contracted an Islamic marriage on 4/5/2007. During the subsistence of their marriage, they were blessed with three issues. Both parties told the court that during the subsistence of their marriage they acquired together two houses and one vehicle make Toyota Noah. The misunderstandings in their marriage started in 2019 when the respondent was transferred to Rukwa. Then it was alleged that he started marital relationship with another woman thereby having a tendency of blaming the appellant as a witch and ended up giving her a *talak*. Due to those misunderstandings the appellant decided to institute a matrimonial case against him.

Before this court, both parties appeared in person. It was agreed by both parties that the appeal be disposed of by way of written submission. Both parties complied with the court order and filed their submission as per the schedule of the court.

Submitting on the first ground of appeal the appellant stated that the learned magistrate failed to give reasons on setting aside the primary court's decision of equal distribution of matrimonial property acquired jointly during the marriage. It is unfortunately that the appellant on her grounds of appeal never complained on the decision of the trial court which

ordered the matrimonial assets to be divided equally. She says at the district court her grievance was based on non-compliance of **Section 114 (4) (d) of the Law of Marriage Act** which requires the court to have regard to the needs of the infant children when determining distribution of matrimonial assets. That unfortunately it was not a ground of appeal by the appellant in the district court.

In her second ground of appeal, she submitted that the learned magistrate erred in law and fact by failure to conduct valuation of matrimonial assets before the court order that the house located at Kisiwani be under the possession of the Respondent and the house located at Mkuranga to be under the ownership of the appellant. She referred this court to **Section 108 (b) of the Law of Marriage Act** which stipulates the duty of the court during the hearing of petition for a decree of separation and divorce. The provision put clearly that the court shall have a duty to conduct inquiry, make arrangement and propose with regard to the division of matrimonial property and satisfy itself that the arrangements are reasonable. But the learned magistrate had never complied with this provision when distributing the house at Kigamboni to the respondent and the house at Mkuranga to the appellant. She argues that the house at

Mkuranga is an unfinished one, and it is merely a hut which is not suitable for an ordinary human being to live. That the said house was built for workers who were working in the farm to keep them temporarily and not permanently. Further that the values of the house at Mkuranga and that at Kigamboni are incomparable. The one at Kigamboni is at the municipality of Kigamboni which is within the commercial city of Dar es Salaam while the temporary hut at Mkuranga is less valuable as it is located in a rural setting.

Arguing on the third ground of appeal she states that the district court did not consider the points of law submitted by the appellant for all the grounds. So, she prays that this honourable court sets aside the decision of the district court.

Lastly, she submitted on the fourth ground that the district court did not consider her grounds of appeal therefore the decision is out of her grounds of appeal and thus the appellant is suffering due to that decision. And further that the appellant is caring the burden of caring children of the marriage who are still very young and no financial support from the respondent.

Replying to the submission for the appellant, the respondent alerted this court that the appellant has raised new grounds of appeal which were not raised at the first appellate court. Then he proceeded to submit on the first ground of appeal that the appellate magistrate gave out reasons to each decision as it appears in paragraph 1 at page 9 of the judgment copy on the issue of division of matrimonial properties and referred to the case of **Gabriel Nimrod Kurwijila V. Theresia Hassani Malongo**, Civil Appeal No 102 of 2018 (Tanzlii) and **Bi Hawa Mohamed V. Ally Sefu** (1985) TLR 32. He says the appellate court reduced the percentage of distribution of matrimonial properties from 60% to 40% due to the fact that the respondent was employed and therefore was financing while the appellant was a housewife and contributed through supervising construction of the houses.

Submitting on the second ground of appeal the respondent opposed the allegation that the appellant was happy with the order for division of matrimonial properties. That she appealed to the district court and two of her five grounds of appeal were based on the issue of matrimonial properties.

Replying to the third ground of appeal, he submitted that the duty of the appellate court was to assess the evidence adduced during the proceeding in the trial court and not otherwise like receiving new evidence. He states that the appellant introduced new facts during her submission at the district court.

He winded up by replying to the fourth ground of appeal that it has no merit. He says it is a known principle that the court can not grant a prayer that was not pleaded earlier. He referred the court to the case of **Abel Maligisi V. Paul Fungameza,PC Civil Appeal No 10 of 2018** in the High Court of Tanzania, in the district registry at Shinyanga. He therefore prays for this court to uphold the decision of the first appellate court.

In her rejoinder, she reiterated what she submitted in chief so I do not see any reason to repeat.

After having the submissions from both sides and going through the grounds of appeal, I find that the party's grievance is based particularly on the distribution of the matrimonial properties. Therefore, the issue is whether this appeal has merit.

Starting with the first and fourth grounds of appeal the appellant says the magistrate did not show the reason of how he reached to the decision on distribution of matrimonial assets and that in his decision he did not consider the submission and rejoinder of the appellant. She argues that looking at the judgment of the district court the magistrate failed to give reasons as to why he decided to set aside the primary court's decision of equal distribution of the matrimonial assets while the appellant on her grounds of appeal never complained on the trial courts' order of equal distribution of matrimonial assets. She further says the district court acted out of her grounds of appeal and hence its decision is irrelevant to the appellant's grounds of appeal and caused her to suffer and she is still suffering due to that decision because the appellant is carrying a burden of caring their children who are very young.

These grounds should not take much of my time as they are very clear from the record. Division of matrimonial properties was among the appellant's prayer when she instituted the matrimonial proceedings at Kigamboni Primary Court. After the trial court ordering equal division of matrimonial assets, she appealed to the district court challenging the order

of division of the matrimonial house and that the court ought not to divide it but rather to declare it as a permanent home because currently children are living therein. During the hearing the respondent challenged the equal division of matrimonial assets, so after having the submissions of both sides the district court did set aside the order for equal distribution of the matrimonial properties. Again, the record is clear that the magistrate gave the justification as to why he reached to that decision. Page 10 (although the referred judgment is not paginated) of the judgment at its first paragraph the magistrate gave reasons as follows:

"Having seen that I am of the view that it was proper for the trial court to divide the matrimonial assets to both the appellant and the respondent however, given the fact that the respondent was the one employed and the appellant was a house wife, a share of a half by half was not fair to the one who was financing the projects. ..."

Generally, the judgment had provided the justification for its decision so these two grounds have no merit.

Coming to the second and third grounds of appeal, the appellant claims that, in dividing the matrimonial properties the magistrate did not consider the contribution of each party on acquiring the said properties. And that in dividing the matrimonial assets the magistrate did not consider the value and evaluation of the assets jointly acquired. From the record, there is no dispute as to the properties acquired during the subsistence of marriage that includes the house at Kigamboni area, a house at Mkuranga and the vehicle make Toyota Noah. Also, there is no dispute that the appellant was a housewife while the respondent was an employee. And this was well determined by the appellate magistrate from page 9-10 (but the judgment is not paginated) of the judgment. Then the court concluded by dividing the two houses among the parties and the vehicle at the ratio of 40% and 60% as to the appellant and respondent respectively.

From this finding, I concur with the appellant that, in dividing the matrimonial properties the appellate magistrate did not consider the value and evaluation of the said assets. The magistrate did not state the ratio of the distribution to be effected to the houses but ended up dividing the two houses to the parties without ascertaining their respective values. **Section 114 (2) (b) of the Law of Marriage Act** (Supra) states that:

(2) In exercising the power conferred by subsection (1), the court shall have regard-

(b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; (Emphasis is mine)

This provision was also clarified in the case of **Yesse Mrisho V. Sania Abdu**, Civil Appeal No. 147 of 2016 (CA) (unreported) in which the Court of Appeal stated that:

*"There is no doubt that a court, when determining such contribution **must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets.**" (Emphasis is mine)*

From the record, there is no dispute that the appellant was a housewife while the respondent was an employee. The acquired properties were obtained through the financial contribution of the respondent while the contribution from the appellant was based on the supervision and taking care of the family. The record shows that when the respondent was in Congo and in Rukwa, he was sending money to the appellant and then the appellant while taking care of the family was supervising the construction of

the two houses. Besides, the domestic duties of the appellant equally amount to contribution. The issue is at which ratio the properties will be divided? **Section 114 (2) (d) of the Law of Marriage Act** stipulates that in exercising the power conferred by subsection (1), the court shall have regard to:

*"The needs of the children, if any, of the marriage, and subject to those considerations, **shall incline towards equality of division.**"* (Emphasis added)

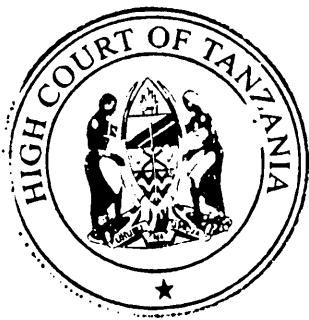
That being the legal position and taking into consideration that the appellant was supervising all the family developments of the matrimonial assets and was taking care of the family, I concur with the decision of the primary court of distributing the matrimonial assets equally. Therefore, both houses and the vehicle should be evaluated and then the proceeds be equally divided among parties.

From the foregoing, I hereby set aside the decision of the district court of division of matrimonial assets and order for equal distribution of matrimonial assets. Other orders remain

undisturbed. Due to the nature of this case, each party will bear own costs.

It is so ordered.

DATED at DAR ES SALAAM this 3rd day of March, 2022.

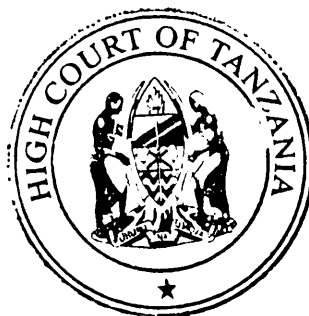


N.R. Mwaseba
N.R. MWASEBA

JUDGE

03/03/2022

Court: Judgment delivered this 3rd day of March 2022 in the presence of the appellant and the respondent.



M.A. Moyo
M.A. MOYO

DEPUTY REGISTRAR

03/03/2022